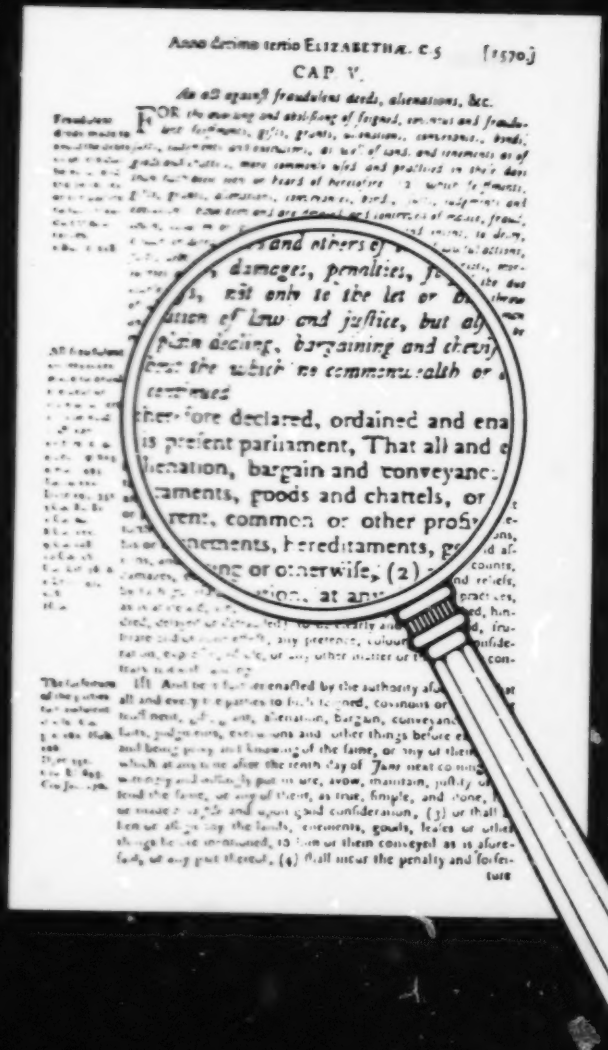
Law Reform Commission of Saskatchewan

Tentative Proposals for Compensation of Accused on Acquittal

Saskatchewan


Anno decimo tertio ELIZABETHÆ. C. 5 [1570]

CAP. V.

An act against fraudulent deeds, alienations, &c.

FOR the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgements and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in this realm than by the statutes now or heretofore in force concerning fraudulent feoffments, gifts, alienations, conveyances, bonds, suits, judgements and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true dealing, bargaining and chevisance, without the which no commonwealth or society can continue:

Be therefore declared, ordained and enacted by this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, (2) and all bonds, suits, judgements, executions, at any time had or made, to the end, purpose or intent aforesaid or to delay, hinder or defraud creditors and others of their just debts, accounts, damages, penalties, forfeitures, heriots, mortuaries or reliefs, shall be deemed, reputed and taken (only as against that person or persons, his or their heirs, successors, executors or assigns, and every of them whose actions, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs by such guile, fraud or covin shall or might be defrauded, hindered or delayed, or his or their and every of their interest, estate or right in anywise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect, any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

II. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bond, suit, judgement, execution and other things before declared and mentioned, and every of them, and every person and persons, bodies politic and corporate, their heirs, successors, executors and assigns, and every of them, and every other person and persons to his, her or their use, benefit or behoof, having or which at any time after the tenth day of June next coming shall have, by, from or under them or any of them, any estate, interest or right of, in or to any lands, tenements, hereditaments, goods or chattels, or any rent, common or profit out of the same, or any of them, which at any time after the said tenth day of June next coming shall be contrived, devised, had, made, practised, executed, published, uttered, avowed, maintained, justified or defended, or any of them, as true, simple, and done, bona fide, and upon good consideration, (3) or shall claim or challenge any the lands, tenements, goods, leases or other things to be conveyed, to him or them conveyed as aforesaid, or any part thereof, (4) shall incur the penalty and forfeiture

87-05792/

Acknowledgement

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TENTATIVE PROPOSALS FOR COMPENSATION OF ACCUSED ON ACQUITTAL

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

July, 1987

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor Douglas A. Schmeiser, Q.C., B.A., LL.B., LL.M., S.J.D., Chairman
Madam Justice Marjorie A. Gerwing of the Saskatchewan Court of Appeal
Mr. Gordon J. Kuski, Q.C., LL.B.

Mr. Kenneth P.R. Hodges, B.A., LL.B., is Director of Research.

Mr. Michael J.W. Finley, B.A., M.A., LL.B. and Mrs. Myra J. Bucsis, B.Ed., LL.B. are the Legal Research Officers. The secretaries are Mrs. Sandra Ritchie and Mrs. Patricia Vogt.

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The Law Reform Commission Act

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplifiction and modernization of the law.

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N o t e
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These proposals have been prepared by the research staff of the Commission and have been approved by the Commission for the purposes of discussion.

It is the policy of the Commission to seek response to its proposals before a final report is prepared for presentation to the Minister of Justice. Accordingly, the Commission invites comments and criticisms from the Bench and Bar and others interested in this particular area of the law.

Submissions should be directed to:

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I. INTRODUCTION

The basis of our criminal justice system is the concept that a person is presumed innocent until proven guilty by law. Safeguards are built into the legal system to protect the rights of those who have been accused of a crime. Their purpose is to ensure that no one will be convicted of a crime which he did not commit. In addition, there are safeguards designed to protect the individual from an erroneous accusation of guilt.

In spite of the protections and safeguards offered by the law, it does happen that on occasion individuals are unjustly convicted or unjustly accused. It is the dilemma of this latter group - those who have been charged with an offence, but who are subsequently able to demonstrate their innocence - which is the subject matter of this paper.

Until recently, the prevailing view has been that such an eventuality is "one of the inevitable hazards of living in society"[1] and that those who have been unjustly accused have been well served if there ultimately is a finding of "not guilty". Now, however, another view is surfacing, that an acquittal is not satisfaction enough. Something more - a form of monetary redress - is required.

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1 Report of the Committee on Costs in Criminal Cases (New Zealand, 1966), para. 28. Cited in Report on Civil Rights - Part 2 - Costs of Accused on Acquittal, Law Reform Commission of British Columbia, 1974, p. 28.

It has no doubt been the dramatic case of Susan Nelles that has pushed the issue of compensation for those unjustly accused so forcefully into the limelight. Susan Nelles is the nurse who was charged in 1982 with the murder of four babies at the Toronto Hospital for Sick Children. There was a period of fourteen months between her arrest and her exoneration. It was reported by newspapers that at the end of that time her legal bills totalled between $150,000 and $200,000.[2]

Most individuals who fall into this category - that is, those who are innocent of the crime of which they have been accused - will not have legal costs that in any way approach the amount incurred by Susan Nelles. Yet the question to be asked is the same in each case: should a person who is innocent and who has been forced to prove that innocence with his own financial resources be compensated in some way? Should a person whose life has been disrupted, whose source of income may have been affected, whose name has been blackened through no fault of his own, receive some form of monetary redress?

The public purse supports the criminal justice system. Yet no one financially assists the innocent accused who is drawn into that system. Does the criminal justice system not have an obligation to the accused who has somehow inadvertently become caught in its mechanism?

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2 The Globe & Mail, Toronto, May 27, 1982 gave the figure of $150,000. The Vancouver Sun, Vancouver, June 4, 1982 reported the sum to be between $150,000 and $200,000.

Although at least two of Canada's Law Reform Commissions have studied the problem of what the criminal justice system owes to those who have been unjustly accused,[3] none of their proposals have been acted upon by their respective governments, nor has there been agreement among the Commissions themselves on the means by which compensation should be awarded. With this paper, the issue is once again being addressed.[4]

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3 The Law Reform Commission of Canada issued a report in 1973 titled Criminal Procedure - A Proposal for Costs in Criminal Cases. The Law Reform Commission of British Columbia issued a report in 1974 titled Civil Rights - Costs of Accused on Acquittal.

4 The Law Reform Commission of Canada and the Law Reform Commission of Saskatchewan collaborated for a time in this area of the law, but ultimately concluded that separate papers were warranted.

II. A SUMMARY OF THE PRESENT LAW

Under the present law, the likelihood that an accused will be compensated for costs is very remote. The reason for this state of affairs is not hard to identify. Until fairly recently, in virtually all cases the Crown neither paid nor received costs.

> [I]n dealing with costs in cases between the Crown and a subject...the rule should be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.[5]

Over the years, statutory provisions have been developed that enable the courts to award costs. However, they are either very limited in scope or have been interpreted in a manner that has reduced their effectiveness.

Criminal law offences are divided into two categories, the indictable offence (the more serious offence) and the summary offence (the less serious offence). Each is treated differently in the Criminal Code. Even in the matter of costs there are differences. Each category, therefore, will be considered separately.

A. Indictable Offences

In the prosecution of indictable offences, there is no general power to award trial costs. There are a few circumstances under which costs may be awarded to an accused but their occurrence is extremely rare. Costs may be awarded to an

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[5] Johnson v. The King, [1904] A.C. 817 (P.C.).

accused when the indictment or count under which he has been charged is incorrect and it is considered necessary by the court to adjourn the matter so that a correction may be made. Under those circumstances, the accused may be awarded costs that he incurred as a result of the system's initial error and the necessity for amendment.[6] Costs may also be awarded in prosecutions for the virtually obsolete crime of defamatory libel.[7] Courts of Appeal hearing indictable offences are explicitly precluded from making orders for costs.[8]

It has also been suggested that superior courts can rely on their inherent powers to impose costs on the Crown, but only in exceptional cases "analogous to contempt of court situations" where "necessary to censor the negligence or misconduct of a party".[9]

Prior to December, 1985, there was much speculation about section 438(2)(c) of the Criminal Code. Did it give a court general authority to award costs?

Section 438(2)(c) stated that the court had the power to regulate the pleading, practice and procedure in criminal matters, including costs. The question whether the word "regulate" included the substantive power to award costs was

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6 Criminal Code, s.529(5).

7 Criminal Code s. 656. See also Law Reform Commission of Canada, Working Paper 35, Defamatory Libel (1984).

8 Criminal Code s. 610(3).

9 A.G. Quebec v. Cronier (1981) 63 C.C.C. (2d) 437.

considered by commentators in scholarly works and by members of the judiciary but a definitive interpretation did not emerge.[10] The word "costs" was deleted when section 438(2) was amended in December of 1985, rendering further consideration of the matter unnecessary.

B. Summary Conviction Offences

Legislation that deals with the awarding of costs in the prosecution of summary conviction offences is found in the Criminal Code in sections 744, 750, 772 and 438(1) and (2)(c).[11]

Sections 744 and 772 provide that the trial court may, at its discretion, award costs that are reasonable for summary proceedings and that are not inconsistent with the schedule following section 772.

A reading of section 744 would lead one to believe that it confers a broad discretion on summary conviction courts to award costs. However, section 744 has been construed as referring only to the exceedingly modest fees and allowances set out in section 772 and the schedule following.[12] The schedule which sets out the fees and allowances that may be charged by summary conviction courts is badly out of date. The last changes to the schedule were made in the 1953-54 revision to the Code, and then only some

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10 R. v. Brown Shoe of Canada Ltd. (1984), 11 C.C.C. (3d) 514; Re Christianson (1951) 100 C.C.C. 289; Rudd v. Taylor (1965) 51 W.W.R. 335 (Q.B.).

11 Criminal Code, R.S.C. 1970, c.C-34.

12 A.G. Quebec v. A.G. Canada, [1945] S.C.R. 600.

of the items were revised upward.[13] For example, mileage costs may be allowed at the rate of 10¢ a mile; if the services of an interpreter are required he may be given $2.50 for each half day he is attending trial, and if he is away from his ordinary place of residence, he is allowed his actual living expenses up to a limit of $10 per day. In addition, and perhaps most importantly, the fees and allowances set out in the schedule do not provide for the item that is the defendant's greatest expense - lawyer's fees. It seems, therefore, that none can be ordered.[14]

It is easy to see that reliance on this schedule has rendered the application of section 744 of little value when one is searching for an avenue by which an accused might be fully compensated for justice gone awry.

In the case of an appeal, section 758 allows a court to make any order concerning costs that it considers just and reasonable. In 1980 the question of whether the power to award costs pursuant to this provision included the awarding of costs against the Crown was raised in the case of R. v. Ouellette.[15] It was concluded that on an appeal from a summary conviction, the Crown may indeed be asked to pay costs. In this particular instance, the Crown was ordered to pay the accused's costs on a solicitor

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13 Robert S. Reid and Peter T. Burns, "The Power to Award Costs in Criminal Costs or How Juridical Illusions Remain Illusions None the less", (1981-82) 24 Criminal Law Quarterly 455, at 474.

14 Ibid., at 473.

15 [1980] 1 S.C.R. 568.

and client basis.[16] Just what the full scope of those costs is likely to be is uncertain. Different courts have handled the matter in different ways. It is an issue that has yet to be resolved.[17]

C. Provincial and Municipal Offences

Provincial and municipal governments also have the power to create offences, and those offences are processed through the criminal justice system. They are often referred to as quasi-criminal offences because they are usually less serious than criminal offences. However, they can still result in fines or jail terms. Examples of Saskatchewan legislation that contain quasi-criminal offences are The Highway Traffic Act, The Liquor Act and The Wildlife Act.

In Saskatchewan, Criminal Code procedures are incorporated by The Summary Offences Procedure Act.[18] Section 3(3) makes Part XXIV of the Criminal Code (including sections 744, 750 and 772) applicable to summary conviction proceedings under provincial law

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16 In a more recent instance of an appeal from a summary conviction, where the Crown was ordered to pay costs to the accused, Mr. Justice Wright of the Saskatchewan Court of Queen's Bench ordered that costs in a fixed sum be paid to the accused; R. v. Moen (1987), 50 Sask. R. 159. Also see: R. v. Wolter (1986), 49 Sask. R. 81.

17 Atrens, Burns and Taylor, Criminal Procedure: Canadian Law and Practice (1983), XX 96-100.

18 R.S.S. 1978, c. S-63.

and municipal law. The payment of costs in provincial and municipal offences is therefore regulated by the provisions of the Criminal Code.

D. The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms[19] has made available a new avenue of compensation. Those who believe their Charter rights have been violated may ask for redress under section 24(1). That section states:

> Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The range of remedies available under section 24(1) includes: to stay or quash proceedings; to dismiss an indictment; to impose a lesser sentence upon conviction; to exclude evidence; to make a declaration that there has been an infringement of a constitutional right; to discipline the person who has infringed the right; to award monetary compensation.[20] In deciding which of those remedies is "appropriate and just" in the context of criminal law, McDonald J. in Germaine v. R. suggests that the requisite remedy is one that furthers the

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[19] Constitution Act, 1982: Part I, Canadian Charter of Rights and Freedoms.

[20] Germaine v. R. (1984) 10 C.R.R. 232 at 242; McLellan and Elamn, "The Enforcement if the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983) 21 Alta. L. Rev. 205.

object of the guaranteed Charter right that has been infringed, without offending the reasonable expectations of the community for the enforcement of criminal law.[21]

It should be emphasized that these remedies are available only when the Charter itself has been contravened. In the criminal process where Charter rights are not violated a request for monetary compensation could not be made under section 24(1). However, for those whose rights have been infringed under the Charter, it is a possible avenue of compensation that should not be overlooked.

A number of commentators have assessed section 24(1) of the Charter and believe that it should be, and will be, given a "generous interpretation".[22] Several judicial decisions reflect the view that section 24(1) should be broadly applied. In Re Southam Inc. v. R. (No. 1)[23] it was stated:

> The spirit of this "living tree" planted in friendly Canadian soil should not be stultified by narrow technical interpretations without regard to its background and purpose; its capability for growth must be recognized.

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21 (1984) 10 C.R.R. 232.

22 Manning, Morris, Rights, Freedoms and the Courts: Practical Analysis of the Constitution Act 1982, at 481, Toronto, Emond-Montgomery Ltd., 1983; Fairley, H.S., "Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review", (1982) 4 Sup. Ct. L.R. 217; Gibson, Dale, "Enforcement of the Canadian Charter of Rights and Freedoms", at 481-527, Tarnopolsky and Beaudoin (eds.) The Canadian Charter of Rights and Freedoms, Toronto, Carswell, 1982.

23 3 C.C.C. (3d) 515.

In R. v. Belton[24] Allen Prov. J. noted:

> As to the relief that may be given, it appears that the Charter has granted a very wide range within which a Court can exercise its discretion.

In Germaine v. R.[25] it was explained that the word "remedy" in the legislation was to be given a "generous interpretation".

Germaine was one of the first cases in which monetary compensation was granted as a remedy under the Charter. McDonald J. therefore felt it was necessary to demonstrate that monetary compensation did indeed form part of the armoury of remedies that may be granted when it is just and appropriate to do so. He looked to the Constitutions and cases of other nations for precedents, relying in particular on the case of Maharaj v. Attorney General for Trinidad and Tobago (No. 2).[26] He concluded that an order for monetary compensation was a remedy available in a court of superior jurisdiction. He added, "I express no opinion about any other court". Compensation was also granted in a case heard one month later, in May of 1984. In Re Marshall and The Queen it was held that since the accused suffered a violation of rights guaranteed by the Charter, he was entitled to his costs (on a solicitor-client basis) as the "appropriate and just remedy".[27]

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24 (1983) 2 C.R.R. 227.

25 Supra, footnote 21.

26 [1978] 2 All E.R. 670 (P.C.).

27 (1984) 13 C.C.C. (3d) 73.

It is interesting to note that McDonald J. in Germaine v. R. leaves open the issue of whether a remedy of monetary compensation is available in any court other than that of superior jurisdiction. This has proved to be a contentious point, with strong opinions held on both sides. McLellan and Elamn argue that section 24(1) authorizes a court to grant any remedy normally within the jurisdiction of that court.[28] A provincial court, therefore, would not have access to remedial powers that are not now available to it. A superior court, he argues, has inherent jurisdiction and may grant any remedy unless prohibited from doing so by statute. It is free to order a monetary remedy, but a provincial court, which does not have inherent jurisdiction, is not.

There are cases which support this view. Lee Prov. J. states that a provincial court does not have the power under section 24(1) "to order the making of an apology, the payment of damages or the performance of some act to draw attention to the transgression of the accused's rights".[29] In the more recent case of R. v. Halpert, Hawkins Co. Ct. J. says:

> With great respect to the trial judge and to the principles of large and liberal interpretation, I feel that a court of competent jurisdiction, within the meaning of section 24(1) of the Charter is limited in its choice of remedies to those within its jurisdictional competence which, in the case of a summary conviction court dealing with costs is

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[28] Supra, footnote 20.

[29] R. v. Blackstock (1983) 29 C.R. (3d) 249 at 254.

> severely, but nevertheless clearly circumscribed by section 744 and 772 of the Code.[30]

As indicated previously in this paper (pages 6 and 7), the schedules set out under sections 744 and 772 are so limited as to be practically valueless.

The contrary argument to the Charter remedy is that the phrase "such remedy as the court considers appropriate and just in the circumstances" refers only to jurisdiction over subject matter and parties and that every court has unlimited discretion to award whatever remedy it considers appropriate and just.[31]

In R. v. B.B.[32] it was held that all courts have the authority to award monetary compensation for an infringement of Charter rights, including Youth Courts.

> It seems that the clear intention of the framers of the Charter was to bestow the authority to grant a just and appropriate remedy, whatever form that might take, on any court with competent jurisdiction to deal with the matter before it for trial.

Porter Prov. J. found that the police had acted in an overly zealous, uncoordinated manner in contravention of the accused's rights and awarded the accused compensation in the amount of $3,000. Judge Porter went on to say that it would not be a broad and generous interpretation of the Charter to say that a particular court may legally grant some remedies but not others.

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30 (1985) 12 C.R.R. 201.

31 Gibson, Dale, "Enforcement of the Canadian Charter of Rights and Freedoms", 481-527, at 507, Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms, Toronto, Carswell, 1982.

32 (1986) 8 C.R.D. 425.45-01.

It would seem that the boundaries of section 24(1) are still being established. For the most part, there is agreement that compensation may be awarded in criminal proceedings in a superior court where the Charter has been violated, even though there is no authority in statute to do so. Whether compensation may be similarily awarded in a provincial court is still cause for dispute, and one that only the passage of time and cases through the courts will resolve.

Although the Charter has opened a new avenue of compensation, it is restricted to those whose Charter rights have been violated. For others who believe they merit recompense from the criminal justice system but whose guaranteed rights have not been infringed, the situation remains the same. There is no adequate financial support for an accused who is innocent and subsequently acquitted. Assistance is limited and infrequent.

It is clear that something else is needed. A new system must be devised - about that there seems to be general agreement. But just what should that new system be? When should an accused who has been subsequently acquitted be entitled to costs? What expenses should be compensated? Who should pay? These are the difficult matters to be examined.

A number of countries have established compensation schemes; others are still in the process of studying the problem. An awareness of how this problem has been dealt with in these other

jurisdictions will be of assistance in a study of this matter. We have therefore provided a brief look at the schemes already in existence.

III. SURVEY OF EXISTING COSTS SCHEMES

A. The United Kingdom

The most recent Act governing costs in criminal proceedings in England and Wales is The Costs in Criminal Cases Act, 1973.[33] This Act consolidated the provisions relating to costs in a number of existing Acts, primarily The Costs in Criminal Cases Act, 1952.[34] It gives the courts wide discretionary authority to award trial and appeal costs to an accused who has been acquitted, or to the prosecutor. The last practice note that was issued to provide direction in this matter stated that the making of such an award "is a matter in the unfettered discretion of the court in the light of the circumstances of each particular case".[35] It stated further that it should be accepted as "normal practice"[36] to award costs where the power to do so is given, except where:

(a) the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is;

(b) there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit;

(c) the defendant is acquitted on one charge but convicted on another, the court should make whatever order seems just having regard to the relative

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33 21 & 22 Eliz. II, c. 14.

34 15 & 16 Geo. VI & 1 Eliz. II., c.48.

35 Practice Note [1982] 3 All E.R. 1152.

36 Ibid.

importance of the two charges and the conduct of the parties generally.[37]

B. New Zealand

Costs may also be awarded in criminal cases in New Zealand. Under its system, the court has the discretion to award costs to the successful defendant.

The procedure to be followed is set out in The Costs in Criminal Cases Act, 1967 (N.Z.).[38] The court has absolute discretion to award a sum it thinks just and reasonable in relation to the costs of the defence. Where there has been an acquittal or discharge, or the information is dismissed or withdrawn for any reason, the defendant may make an application.[39]

The court must, however, take into account all relevant circumstances, and in particular:

(a) whether the prosecution acted in good faith in bringing and continuing the proceedings;

(b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;

(c) whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty;

(d) whether generally the investigation of the offence was conducted in a reasonable and proper manner;

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37 Ibid.

38 N.Z.S. 1967, No. 129.

39 Ibid., s.5.

(e) whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;

(f) whether the information was dismissed because the defendant established (either by the evidence of a witness called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;

(g) whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.[40]

There is no presumption for or against the granting of costs,[41] but no defendant is to be granted costs just because he has been acquitted or discharged or because the information has been dismissed or withdrawn.[42] On the other hand, he shall not be refused costs merely because the proceedings were properly brought and continued.[43]

The New Zealand legislation does make reference to one situation where the costs of a defendant who was convicted might be paid. Where the accused is put to a greater expense in his defence because the prosecution wishes to address a difficult or important question of law, then he may receive costs that are just and reasonable.[44]

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40 Ibid., s.5(2).

41 Ibid., s.5(3).

42 Ibid., s.5(4).

43 Ibid., s.5(5).

44 Ibid., s.6.

Despite the comprehensive legislation, the New Zealand courts seem reluctant to award costs to acquitted persons. For example, the expenditure for this item totalled only $8,695.00 in the financial year ending March 31, 1986. Officials from the New Zealand Department of Justice explain the small figure on the basis that the bulk of criminal cases are defended by legal aid. Those whose cases were conducted by legal aid would not be entitled to compensation because they had not used their own financial resources in mounting a defence. In the same fiscal period, that is, the financial year ending March 31, 1986, $4.859 million was spent on legal aid for offenders.[45]

C. Australia - New South Wales

In the Australian State of New South Wales costs may be awarded to an accused who has been acquitted if the court finds that it would not have been reasonable for the prosecution to institute proceedings had they been in possession of all the relevant facts before the proceeding; and that any conduct of the defendant that might have contributed to the beginning or continuation of proceedings was reasonable in the circumstances.[46]

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45 Correspondence from the New Zealand Department of Justice, 1986.

46 Costs in Criminal Cases Act, 1967 (N.S.W.) s.3.

In coming to a determination the court may refer to all relevant facts established in the proceedings and all relevant facts contained within the application itself.[47]

If the court finds that the above criteria have been met, it may award a certificate to the applicant. This certificate is then presented to the Under Secretary of the Department of the Attorney General who approves the payment.

Although this avenue to compensation has been available since 1967, applications under it are extremely rare. To date total awards have never exceeded the $10,000 the Treasury has allotted for this purpose. Often, the awards made during the course of a year are minimal. In 1972, the Law Reform Commission of Western Australia noted that the annual cost to the government of the scheme in New South Wales was $1,255.50 for 1969 and $758.00 for 1970.[48]

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47 Ibid.

48 Payment of Costs in Criminal Cases, Western Australia Law Reform Committee, Working Paper, 1972, p.14.

IV. PROPOSED COMPENSATION SCHEME

It is clear that in Canada the system of costs in criminal matters is outdated and of little value. P.T. Burns and R.S. Reid, in the book Criminal Procedure: Canadian Law and Practice, state the case very strongly:

> The present system of costs in criminal matters makes little sense. It is an anomalous and archaic system based on a principle that is no longer valid in our modern society. The case authority patently illustrates that the system does not work; in many cases costs are awarded without proper authority, and in other cases the costs that are awarded are totally inadequate to be classified as compensatory.[49]

They conclude that apparently the Canadian public is willing to accept this situation and are not concerned enough to institute a scheme of compensation.[50]

It is our view, however, that the Canadian public has indicated a very real concern about the issue of costs for an innocent accused. In the aftermath of the Susan Nelles trial, media editorials and comment, including letters to the editor, strongly supported the view that the criminal justice system owes something to those who have become entangled in the legal process through no fault of their own. Several newspapers[51] featured editorials supporting some sort of compensation scheme for those

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49 Supra, footnote 17, at XX 151.

50 Ibid.

51 Editorial, The Globe and Mail, Toronto, May 27, 1982; Letters to the Editor, The Globe and Mail, Toronto, May 27, 1982; The National, Ottawa, February, 1982; The Star-Phoenix, Saskatoon, August 8, 1981; The Leader-Post, Regina, June 16, 1982, and others.

who have been forced to mount an expensive defence to prove their innocence. It is the view of the Commission that the public would support a scheme which provides compensation. The Commission believes, further, that simple justice demands it.

The same issues that the Commission is considering here have already been studied by those jurisdictions where a system of redress for the innocent accused has been implemented. The following statement is the philosophical basis upon which the New Zealand legislation is grounded:

> It would, we think, be common ground that by accepting the benefits of an ordered society the citizen becomes subject to various dangers and risks, among them the risk of being suspected, of being arrested and of being prosecuted for offences he has not committed. These dangers are minimized by the provision of fair procedure, trained and upright police forces, and speedy and efficient access to the Courts. Nevertheless, there are and will always be cases where innocent men are prosecuted without any fault being necessarily laid at the door of the police. It does not seem to us to follow that in these circumstances the citizen must also be expected to bear the financial burden of exculpating himself. Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences.[52]

The Commission is in basic agreement with that view. No system works perfectly all the time. And when a system is as vast and complex as that of criminal justice, it should not be a surprise that occasionally events go awry without blame being attributable to anyone. Although these sorts of unhappy

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52 Report of Committee on Costs in Criminal Cases (New Zealand, 1966), para. 30. Cited in Report on Civil Rights - Part 2 - Costs of Accused on Acquittal, Law Reform Commission of British Columbia, 1974, p. 28.

occurrences are minimal, they cannot be completely prevented. No one can promise the citizen that he will not be unjustly accused. But the system can promise the innocent accused compensation for the cost of proving his innocence. The Law Reform Commission of Saskatchewan believes this is a promise that should be made.

As indicated previously in this paper, there are schemes in existence in various other jurisdictions, most notably Great Britain, New Zealand and Australia. Although their schemes look good on paper, it seems that very few individuals are receiving the benefits the legislation was intended to provide (see page 14). Can the problems with those systems be overcome?

Another difficulty is the question of who should be compensated. This is the issue that has generated the most discussion, particularly within the legal profession. Other matters that have to be decided are: what expenses incurred by the accused are to be compensated; what process would be used to award compensation; how should concurrent offences be dealt with?

We are aware there are very divergent views on the kind of a scheme that should be implemented. But this is no reason to defer action. To wait until there is consensus is to take no step at all.

A. Who should be compensated?

The most controversial and important issue is that of who should be compensated. There are primarily two schools of thought. One holds that every person who is charged and is

subsequently acquitted is entitled to compensation. The Commission is not in accord with this all-encompassing view. We do not believe it is right to award compensation to those accused who have probably committed the act charged or a similar offence. Rather, we believe (as do most jurisdictions which have already implemented a compensation scheme) that compensation is owing only to those who are truly innocent and who have been drawn into the legal system through no fault of their own.

Legislation reflecting these principles would not allow an acquitted accused compensation when that acquittal is based solely on a technicality or on a reasonable doubt. Rather, compensation would be allowed only when the evidence has satisfied the Court that the accused, on a balance of probabilities, did not commit the offence. A determination of who is entitled to compensation would be made by the court in accordance with certain guidelines.

Nor would it allow compensation to the acquitted accused who, for some reason, had made it difficult for the justice system to ascertain his innocence. The Commission believes that such an individual should not be awarded compensation if it is largely as the result of his own actions that he finds himself in the predicament of being before the courts. In such a situation it is not unreasonable that he bear the expense of his defence.

There is one category of accused persons who, although being without fault, would not be eligible for compensation under the scheme proposed here. These are individuals who have been

convicted of an offence but who subsequently, after satisfying the sentence imposed (or a portion thereof), are found not to have been guilty of the offence for which the conviction was originally entered. While we believe this is a serious concern, it is our view that the basis of compensation for this category is different enough to warrant a separate compensation scheme. The person who has been convicted and who has suffered the consequences of that conviction, whether it be prison, or loss of reputation, or other more tangible losses such as loss of income, has a different basis for compensation than the acquitted accused who is seeking redress only for the costs associated with criminal proceedings.

Often we have used the term acquitted when describing those who are entitled to apply for compensation. By that term we mean to include all those defendants who have been acquitted at trial or on appeal, as well as: those whose charges have been withdrawn or discontinued; those who have been granted a stay of proceedings; and defendants who have been discharged after a preliminary hearing. It is to be emphasized, however, that an "acquittal" would not, in and of itself, be determinative of the compensation issue. Rather, it merely determines one's entitlement to bring an application for compensation.

B. The "third verdict" Problem

The Commission's decision to recommend compensation only for the truly innocent may be met by the criticism that a "third verdict" will be created. The contention is that by awarding compensation to some acquitted and not to others two classes of innocence have been created.[53] The end result is three verdicts: (1) guilty, (2) not guilty, with compensation (meaning probably innocent), and (3) not guilty, without compensation (meaning probably guilty).

It is suggested that this creates a problem for the accused who is acquitted but is not awarded compensation, because he may not be seen by the public to be innocent. The critics argue further that under our criminal justice system it is a person's right to be presumed innocent until proven guilty according to law. The method of compensation proposed here would deny the individual who was acquitted, but not awarded costs, that right.

It is the view of the Commission that the the "third verdict" problem is not as insurmountable as it might appear. The public, by and large, is aware of the distinction between "true innocence" and acquittal or discharge. They know that there are occasions when someone who has committed a crime "gets off". Often acquittal and innocence do not converge because of the strict rules of proof and strict procedural requirements set by the criminal justice system. These standards are necessarily

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53 Criminal Procedure, A Proposal for Costs in Criminal Cases, The Law Reform Commison of Canada, 1973, pp. 7 and 8.

stringent so that the innocent may be protected from conviction. But are the same strict rules of proof and procedure equally applicable to a determination of costs? In our view they are not.

It would be appropriate to rely on other lesser standards of proof and to take into account the reasons for acquittal in determining who is entitled to compensation. The British Columbia Law Reform commission ~~believes~~, which studied this problem in 1973 concluded:

> An award of costs to the accused who is acquitted on an obvious technicality when the weight of evidence would otherwise support a conviction is more likely to bring the law into disrepute in the public eye than any theoretical violation of principle.[54]

The Commission is in accord with this view. While the public may be ready to compensate the truly innocent, we do not believe they would be disposed to compensate an accused who was "lucky to get off", to use a turn of phrase employed by the New Zealand Report.[55] This serves as an indication that the singling out of the "truly innocent" will not throw the criminal justice system into disarray.

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[54] Report on Civil Rights, Part 2 - Costs of Accused on Acquittal, Law Reform Commission of British Columbia, p.33.

[55] Report of Committee on Costs in Criminal Cases (New Zealand, 1966). Cited in Criminal Procedure: A Proposal for Costs in Criminal Cases. The Law Reform Commission of Canada, 1973, p. 8.

It is for these reasons that we recommend the award of compensation be made only to some of those accused who are acquitted, that is - those who are also found to be "truly innocent".

C. The Basis for Compensation

In the Commission's opinion, some of the criteria which the court should consider in its determination of who is without fault are:

(a) Whether the charge was dismissed on a technical point even though the evidence as a whole would support a finding of guilt;

(b) Whether the charge was dismissed because the tribunal considered the accused to be innocent in fact;

(c) Whether the accused did anything that contributed or might have contributed to the institution or continuation of the proceedings or that, if he did do so, it was reasonable in the circumstances;

(d) Where the accused is acquitted on one or more charges, but is convicted on another charge or charges, the relative importance of the charges involved.

This is not meant to be an exhaustive list of all the possible factors that could be considered relevant to the determination of one's eligibility to compensation; it is a list of the more common factors which would be relevant to such a determination. Similar factors have been identified in the New Zealand compensation scheme and have also been the basis for the recommendations put forward by the Law Reform Commission of British Columbia.[56]

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[56] Supra, footnote 55, at p. 37 and footnote 54.

The British Columbia Law Reform Commission is again in accord with New Zealand on the question of whether there should be a presumption for or against costs. They conclude that there should be no presumption at all and we agree with this position. To create a legal presumption in favour of costs in all cases of an acquittal would be to place a severe restriction on the presiding judge's discretion to determine the issue of compensation. Further, such a presumption would result in the primary burden being placed on the Crown to establish the defendant's disentitlement to compensation. We believe the better approach is to grant to the court complete unfettered discretion to determine the issue of eligibility for compensation. If the circumstances commonly considered relevant to such applications (as set out above), are to be enumerated in the legislative scheme, they should be prefaced in a way which precludes their being taken as imposing a restriction upon the court's overriding discretion in such matters.

D. Offences Covered

The Commission proposes that the scheme encompass criminal offences and quasi-criminal (regulatory) offences, both federal and provincial. We expect that where regulatory offences are concerned, the cost of mounting a defence will, in most cases, be minimal. However, on occasion, more significant expense may be

incurred, and for this reason we propose that an accused who is acquitted of a regulatory offence also be entitled to apply for compensation.

E. Administration

As indicated, payment of compensation should be from public monies, from a fund established for that purpose.

The province would be responsible for the administration and payment of awards arising from provincial regulatory offences, and it is hoped that the federal government would assume responsibility in this regard for matters relating to federal regulatory offences. It is further suggested that any system of compensation that is ultimately implemented by the federal government and is available to accused persons charged with criminal offences would best be administered by the province, with the actual cost of such compensation awards being shared by both federal and provincial governments. The manner in which this would be done is a matter for negotiation between the two.

The establishment of a fund as suggested above has a further advantage - it enables an award to be made to the accused rather than against the Crown. To make an award against the Crown implies fault on the part of the prosecutors or the police or the body or individual who laid the charge. That is not the intent of this proposal. There have been and will continue to be instances where a charge is properly laid even though the ultimate result might be acquittal. To imply fault would be

inappropriate where no fault exists. Such a likelihood, in addition, might make police officers and prosecutors overly cautious in the pursuit of their duties.

There are instances, however, where the police, prosecutor, government department, public body or individual may have acted negligently or in bad faith in bringing proceedings forward. Other jurisdictions do make provision for the awarding of costs against the Crown in these rare circumstances.[57] A mechanism which would allow for the recognition of reprehensible behaviour might prove to be particularly valuable where actions have been brought under private prosecutions. The knowledge that such a provision exists would serve to deter frivolous actions and punish parties who bring them. Whether or not Saskatchewan legislation should contain such a provision is an issue that requires further study.

F. Procedure

This report has focused on the theoretical basis and merits of compensation schemes in general, and has outlined at a conceptual level a proposed scheme for Saskatchewan. Essential to the acceptance of any scheme for payment of costs is a satisfactory procedural framework. The Commission recognizes that a set of rules must be formulated which will not unduly delay the criminal process.

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57 Great Britain: Practice Note [1982] 3 All E.R. 1152; New Zealand: Costs in Criminal Cases Act, 1967 (N.Z.), N.Z.S., 1967, No. 129 s.7(2).

As a general rule all accused persons who are ultimately "acquitted" would be eligible to make an application for compensation. It would be the judge who disposes of the charge at the trial, appeal or preliminary hearing who would hear the application for compensation. The judge would be at liberty to consider all facts and circumstances considered relevant to the issue, established either during the proceedings or on the application itself. A right to compensation would arise only upon a finding of "true innocence". It would then be the judge's function to determine the amount of compensation to be awarded, after hearing from the accused about the expenses incurred in mounting his defence. In the vast majority of cases, it is anticipated that such applications would be conducted in an informal manner, similar to that followed when speaking to sentence. Occasionally something further may be required, but it is not the Commission's intention to introduce a second trial into the proceedings.

In instances where a charge has been withdrawn or stayed, an application for compensation could still be made. When this occurs early on in the proceedings, the accused will have spent little on his defence. However, if proceedings are disposed of close to trial, the accused may already have incurred significant legal fees or other necessary expenses. In such a case, an application for compensation could be made to the court that would have heard the matter if the charge had not been withdrawn or stayed.

Special procedural rules must be formulated when oral submissions are inadequate to resolve fully the issue of costs. Answers to questions such as who should be able to call witnesses and whether police files, Crown files and other documents may be subpoenaed are critical to the successful implementation of the proposed cost scheme. Undoubtedly, further study will be required to determine how the scheme can best be implemented. The Commission will elicit the views of the Bar and Bench on the procedural implications before issuing a final report.

G. Amount and Scope of Compensation

It is the Commission's view that an award should be sufficient to compensate the accused for the expenses reasonably incurred in conducting his defence. These could include: counsel fees, the expenses incurred in calling witnesses or producing other evidence, travel and accommodation disbursements, or any other disbursements which were reasonable and necessary to participate in the proceedings. The court would have the discretion to award a sum which it considered just and reasonable taking into account all relevant circumstances.

H. Further Considerations

(a) Included or Concurrent Offences

A difficult situation arises when an accused is acquitted of one offence but convicted on an included offence, or of another offence on which he was tried concurrently. In what manner should he be compensated, if at all?

We believe there may be occasions where an award would be appropriate. We have therefore made provision for this eventuality in the list of factors to be considered by the court when assessing the merits of the applicant's claim. The court will be asked to consider the relative importance of the charges involved where the accused is acquitted on one or more charges, in its determination of whether an award should be made.

(b) The Final Result

An award for compensation should be based on the final result. For example, if an individual were convicted at trial but subsequently on appeal was successful and the charges were dismissed, an application for compensation could then be launched. However, if the appellate court, rather than dismissing the charge, ordered a new trial, an application for compensation would necessarily have to be postponed until the charges were finally disposed of at the second trial. It is only after final vindication that compensation should be considered. This finality would occur only after all appeals had been exhausted or abandoned.

(c) The Legal Aid Client

A significant number of those who travel through the criminal justice system are assisted in their defence by legal aid. This, however, should not present a difficulty if an application for compensation is made upon acquittal. The accused would ask to be reimbursed for expenses actually incurred, if any. This would be only those expenses not covered by the legal aid tariff.

It may be worth noting that data collected by the Law Reform Commission of Saskatchewan indicates that because so many of those who do pass through the criminal justice system are supported by legal aid, a compensation scheme would not represent a major government expenditure.

V. SUMMARY

The protections and safeguards afforded by the criminal justice system do not always provide adequate protection against the risks of being unjustly accused of a crime. An acquittal in such instances is not always sufficient to fully compensate the individual who has been drawn into the criminal process through no fault of his own. We propose that a new scheme of compensation be introduced into the law of Saskatchewan, which would significantly expand the court's jurisdiction to award costs to accused persons in appropriate cases.

Our recommendations in this regard may be summarized as follows:

1. The proposed compensation scheme would have application to all criminal and quasi-criminal proceedings, both federal and provincial, instituted in Saskatchewan. Payment of compensation would be from a public fund established for that purpose and awards would be made to the accused rather than against the Crown. The provincial government would administer the scheme and it is hoped that the actual costs of such compensation awards would be shared by the federal and provincial governments.
2. All accused persons who are acquitted would be eligible to make application for compensation. This would include: all those defendants who have been acquitted

at trial or on appeal; those whose charges have been withdrawn, discontinued, or stayed; and those who have been discharged after a preliminary hearing.

3. One's eligibility to bring an application must be distinguished from one's entitlement to compensation. Although all "acquitted persons" would be eligible to make application, it is only the "truly innocent", that is, those who have been drawn into the legal system through no fault of their own, to whom compensation would be owing. This would be a discretionary matter, that is, to be determined by the court upon application. We see factors such as the following as being relevant to this determination:

   (a) Whether the charge was dismissed on a technical point even though the evidence as a whole would support a finding of guilt;

   (b) Whether the charge was dismissed because the tribunal considered the accused to be innocent in fact;

   (c) Whether the accused did anything that contributed or might have contributed to the institution or continuation of the proceedings or that, if he did do so, it was reasonable in the circumstances;

(d) Where the accused is acquitted on one or more charges, but is convicted on another charge or charges, the relative importance of the charges involved.

4. Once a final determination of "true innocence" is made, a right to compensation would follow. An award should be sufficient to compensate the accused for the expenses reasonably incurred in conducting his defence and could include: counsel fees, the expenses incurred in calling witnesses or producing other evidence, travel and accommodation disbursements, or any other disbursements which were reasonable and necessary to participate in the proceedings.

5. The procedure to be followed on such applications should be as simple as possible, and in most cases similar to that followed when "speaking to sentence". Further study is required to determine the appropriate procedure in the more difficult cases where inconsistencies and conflicts have arisen. The views of the Bar and Bench will be elicited.